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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. —

UNITED STATES OF AMERICA, APPELLANT

v.

GEORGE I. WITKOVICH, ALSO KNOWN AS JURI ISADOR WITKOVICH

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinions of the District Court on the original motion to dismiss and the supplemental motion to dismiss are not yet reported. Copies thereof are set forth in Appendix A, *infra*, pp. 12-24.

JURISDICTION

On May 10, 1956, the District Court entered an order dismissing the indictment on the ground that it did not allege an offense under Section 242(d) of the Immigration and Nationality Act of 1952, as the court construed that statute. The notice of appeal to this Court was

filed in the District Court on June 8, 1956. Jurisdiction of this Court to review on direct appeal the decision of the District Court dismissing the indictment, based on a construction of the statute on which the indictment was founded, is conferred by 18 U.S.C. 3731.

QUESTION PRESENTED

Under Section 242(d) of the Immigration and Nationality Act of 1952, an alien against whom a final order of deportation has been issued but whose deportation has not been effectuated within six months of such final order is, pending eventual deportation, subject to supervision under regulations prescribed by the Attorney General which must include, *inter alia,* a condition requiring the alien "to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper."

The question presented is whether an alien ordered deported for past membership in the Communist Party, who is subject to such an order of supervision, may be questioned concerning present membership in and activities on behalf of the Communist Party and other organizations and associations with particular individuals, so that willful failure to answer such questions constitutes a crime under Section 242(d), or whether the inquiry authorized by the statute must relate solely to the alien's availability for deportation.

STATUTE INVOLVED

Section 242(d) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 208, 211, as amended Septem-

ber 3, 1954, 68 Stat. 1232,[1] 8 U.S.C. (1952 ed. Supp. II) 1252(d), provides:

> Any alien, against whom a final order of deportation as defined in subsection (c) heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information, under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

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[1] This amendment deleted the words "shall upon conviction be guilty of a felony, and" from the list of sanctions set forth in the final sentence.

STATEMENT

Appellee is an alien who was ordered deported because of membership in the Communist Party. When the order of deportation was not effectuated within six months after it had become final, he became subject to the supervision requirements of Section 242(d), *supra*. On March 4, 1954, he was served with an order of supervision, a copy of which is set forth in Appendix B, *infra*, pp. 25-29. The order of supervision required, *inter alia:*

> That said alien shall terminate and remain disassociated from membership in, if any, support or other activity if any, in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any state, or of any foreign state or of any political or geographical subdivision of any state, any section, subsidiary, branch, affiliate or subdivision of any such group or organization.
>
> That said alien shall refrain from associating with any person, knowing or having reasonable ground to believe that such person is a member of or affiliated with or is engaged in any promotion of any of the activities mentioned in subparagraph above.

In October 1955, an indictment was returned against appellee in the United States District Court for the Northern District of Illinois charging a violation of Section 242(d) of the Immigration and Nationality Act of 1952, in that on September 14, 1954, appellee had willfully failed to answer questions and give information as required by the statute and the order of supervision. The questions which appellee refused to answer

are set forth in the indictment, and include questions as to appellee's membership in the Communist Party and other organizations, attendance at meetings of the Communist Party and other organizations, and his acquaintance with a number of individuals.[2]

Appellee moved to dismiss the indictment on the ground, among others, that the statute on which the indictment was founded was unconstitutional. In an opinion, dated February 15, 1956, the District Court upheld the constitutionality of the statute but stated that he interpreted it to confer on the Attorney General "power to supervise the alien to make sure he is available for deportation, and no further power" (Appendix A, *infra*, pp. 16-17). The court held that clause (3) of the statute, requiring as one of the conditions of supervision, that the alien be required to give information "as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper", must be read "to mean such information as is necessary to enable the Attorney General to be certain that the alien is holding himself in readiness to answer the call to be deported when it comes" (Appendix A, *infra*, p. 16).

After a motion by the government for clarification of the opinion, and a supplemental motion by appellee to dismiss the indictment on the ground that it appeared from the face thereof that none of the questions were relevant to availability for deportation, the District

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[2] The transcript of the hearing held on September 14, 1954, indicates that appellee refused to answer on First Amendment grounds and did not claim the privilege against self-incrimination under the Fifth Amendment.

By stipulation, the order of supervision and the transcript of the examination of appellee on September 14, 1954, are included in the record on this appeal.

Court dismissed the indictment. In its memorandum opinion, it reaffirmed its previous construction of Section 242(d) as conferring on the Attorney General powers of supervision only to make certain that the alien will be available for deportation. By that test, it found that none of the questions set forth in the indictment was relevant, Appendix A, *infra* pp. 18-24.

THE QUESTION IS SUBSTANTIAL

Section 242(d) of the Immigration and Nationality Act of 1952 provides for supervision of aliens who have been ordered deported but whose deportation has not been effectuated within six months after the order of deportation has become final. It sets forth certain conditions which must be included in the orders of supervision, including one that the alien be required "to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper", and another condition that he be required "to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case". Pursuant to this authority, the Attorney General, through the Immigration and Naturalization Service, has imposed restrictions on conduct or activities to fit the particular type of case involved, *e.g.*, special restrictions for those ordered deported because of criminal activties, other conditions for those to be deported because of membership in the Communist Party. As to the latter group, among which appellee's case falls, it is usually made a condition of supervision that the alien refrain from participation in and active support of the Communist Party and from association with

persons known or believed by him to be Communists. The questions which appellee is charged with having willfully failed to answer relate to that type of activity.

The holding of the District Court that this willful failure to answer is not a crime because the Attorney General may inquire only as to matters which directly concern availability for deportation would substantially curtail the authority of the Attorney General to impose restrictions on the conduct of supervised aliens, not only in this type of case, but in all others. The ruling is, we believe, contrary to the language of the statute which is sweeping in its grant of authority, inconsistent with the intent of Congress as revealed by the legislative history, and in conflict with the decision of this Court in *Carlson* v. *Landon*, 342 U. S. 524.

1. The language of the 1952 Act is very broad. Had Congress intended to confer on the Attorney General only the power to prescribe and inquire about conditions which directly relate to availability for deportation, it would hardly have been necessary to use the all inclusive language of clause (3) requiring the alien "to give information under oath as to his nationality, circumstances, habits, associations, and *such other information, whether or not related to the foregoing,* as the Attorney General may deem fit and proper" (emphasis added). Rather, this sweeping language suggests that the Congress intended the Attorney General to do what was done here, *i.e.*, tailor the conditions of supervision to the circumstances of each case so that the alien, who has already been determined to be of the class which Congress regards as undesirable, should not, merely because his deportation cannot be effectuated, be in a position to continue the activities which gave rise to his deportation.

2. The legislative history confirms this view. Section 242(d) had its origin in the Hobbs Bill, H.R. 10, 81st Cong., which was designed to deal with the problem posed by the many aliens who had been ordered deported but remained in the United States indefinitely because the countries of their nationality refused to receive them (see H. Rep. 1192, 81st Cong., 1st Sess. pp. 7-10; S. Rep. 2239, 81st Cong., 2d Sess. pp. 4, 6-8). As originally introduced, Section 4 of the bill provided that, if deportation had not been effected within six months of the final order, the alien would be subject to further supervision or *detention*. The hearings on the bill (Hearings before Subcommittee 1, House Judiciary Committee on H.R. 10, 81st Cong., 1st Sess.), as well as the reports, make clear that the sponsors of the legislation were particularly concerned with the fact that known criminals and Communists who could not be deported were continuing their activities without restraint.

A letter from the Attorney General (Hearings, pp. 4-6) presented forty case histories, some of which are discussed in H.Rep. 1192, 81st Cong., 2d Sess. pp. 8-9. Among those was Frank E. Spector who was described in the Attorney General's letter as "a distinct threat to the national security of the United States" with the comment that we "have no means whereby he can be taken into custody" (H. Rep. 1192, p. 8). The Attorney General also referred to the need for power to excise continuous supervision and control over aliens who "sometimes engage in subversive activities" (Hearings, p. 5). There were likewise references to sex criminals "allowed to continue at large in the United States as a potential menace" (H. Rep. 1192, p. 8). The report states (p. 10):

> The committee feels that aliens illegally here are not necessarily entitled to enjoy precisely the same privileges as those who are lawfully resident, merely because of the inability of this Government to carry out its policy to rid the country of their presence in conformity with law. If deportation proves impossible, it seems reasonable that subversive, criminal, immoral, and other undesirable persons should be subject to supervision and control by the Government in order that their activities and conduct may be known.

The provision for detention was subsequently dropped because of expressed doubts as to its constitutionality (see S. Rep. 2239, 81st Cong., 2d Sess. p. 8). Eventually, only a requirement of supervision, essentially the same as that of present Section 242(d) of the 1952 Act, was enacted as Section 23 of the Internal Security Act of 1950, 64 Stat. 1010. There is nothing which shows any lessening of the Congressional concern with the potential danger to national security from the activities of deportable aliens which had led to the original suggestion of the more drastic sanction of indefinite detention. The very fact that the provision was enacted as part of the Internal Security Act of 1950 indicates that Congress contemplated that the power of supervision given to the Attorney General would be used in the interests of the national security to curb the actions of those ordered deported for Communist activities.

3. In *Carlson* v. *Landon*, 342 U. S. 524, this Court held that the power (conferred by Section 23 of the Internal Security Act of 1950) to hold aliens in custody pending a determination of deportability could properly be invoked by the Attorney General, not only on

the basis of probable availability for deportation, but also by reason of the threat to the national security represented by the activities of participating members of the Communist Party. If that is a proper basis for complete detention before deportability has been determined, it must follow that disassociation from activities in support of the Communist Party is a reasonable condition of supervision for those aliens whose deportation has been ordered—who should, in accordance with the Congressional will, be out of the country, but who are here only because of the special circumstance that no country will receive them. And if it is a reasonable condition of supervision, an alien may properly be questioned with respect to his compliance therewith.[3]

4. As of March 31, 1956, there were approximately 3500 orders of supervision directed to aliens whose deportation had not been effectuated within six months after the final deportation order, all of which would to some degree be affected by the ruling of the District Court. Approximately 225 of such orders relate to persons with Communist backgrounds. The question here presented is therefore clearly of importance in the administration of the Immigration and Nationality Act of 1952.

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[3] The particular question here involved was part of the broader attack on the constitutionality of Section 242(d) which was argued before this Court in *Nukk* v. *United States* (No. 29, O.T. 1955), but was not reached for decision. 350 U.S. 869.

CONCLUSION

In sum, Congress contemplated that aliens ordered deported, but whose deportation could not be effected, would be subject to reasonable restrictions on their activities designed, not only to see that they remained available for deportation, but to prevent them from engaging in harmful activities. The District Court was therefore in error in dismissing the indictment, and its decision should be reviewed by this Court.

OSCAR H. DAVIS,
Acting Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
Attorney.

JULY, 1956.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 55 CR 607

UNITED STATES OF AMERICA

vs.

GEORGE I. WITKOVICH, also known as JURI ISADOR WITKOVICH

MEMORANDUM

This is an indictment under Title 8 U.S.C. Sec. 1252 (d), which reads:

> "(d) Any alien, against whom a final order of deportation as defined in subsection (c) of this section, heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) *to give information under oath as to his nationality, circumstances, habits, associations, and activities,* and

such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall wilfully fail to comply with such regulations, or *wilfully fail to* appear or to *give information* or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall upon conviction, be *guilty of a felony,* and shall be fined not more than $1,000 or shall be imprisoned not more than one year, or both." (Italics added.)

A motion to dismiss the indictment, attacking the constitutionality of the statute, is now before the court. The charge is that defendant violated clause (3), underlined above, in that he wilfully failed to answer certain questions which are set forth in the indictment. There is no allegation that he refused to appear, to submit to a medical or psychiatric examination, or to submit to reasonable restrictions on his conduct; these requirements are not, therefore, directly involved, although incidental consideration of them is necessary.

The parties agree that this Act is an exercise by Congress of the power of the United States as a sovereign state to deal with aliens within its territory (*Carlson v. Landon,* 342 U.S. 524 (1952); *United States v. Tandaric,* 152 F. 2d 3, 5 (C.A. 7, 1946); cert. den. 327 U.S. 786). To be upheld, it must constitute a valid delegation of that power to the Attorney General, in terms

definite enough to form a standard of guidance for his conduct (*Winters v. New York,* 333 U.S. 507, 515 (1947); *Lichter v. United States,* 334 U.S. 742, 786 (1948)). Whether it does or not can be determined only by an examination of the section in its context: Title 8 U.S.C.A. 1251, *et. seq.*, and the cases which have interpreted those sections. Section 1251 provides that any alien in the United States shall be deported upon the order of the Attorney General for causes there set forth; section 1252(b) prescribes the procedure for the entry of such an order. Pending determination of deportability, an alien may in the discretion of the Attorney General be continued in custody, or released on bond or conditional parole (Section 1252(a)). The Attorney General's discretion under this section is not unlimited, but may be reviewed by the courts to determine whether he acted reasonably (*U.S. v. Shaughnessy,* 212 F. 2d 128 (C.A. 2, 1954); *U. S. v. Holton,* 205 F. 2d 228, 230 (C.A. 7, 1953); *Ocon v. Landon,* 218 F. 2d 320, 324 (C.A. 9, 1954). After the entry of a final deportation order, the Attorney General is given six months within which to "effect the alien's departure," during which the alien may be detained or released on bond. (Sec. 1252(c)). The alien must be released from detention sooner than six months if it appears that there is no reasonable possibility of his being deported in the foreseeable future (*U.S. v. District Director of Immigration,* 117 F. Supp. 541 (S.D. N.Y., 1953); *U. S. ex rel Cefalu v. Shaughnessy,* 117 F. Supp. 473 (S.D. N.Y., 1954)). Although this subsection provides that after the six-months period, if deportation has not been effected, the alien "shall become subject to such further supervision and detention pending

eventual deportation as is authorized in this section," it has been held that "and detention" is surplusage, the period of detention must terminate after six months, and the alien thereafter be subject only to such detention as may result from a violation of the supervision provisions of subsection (d)(3). (*U. S. ex rel Youw v. Shaughnessy*, 102 F. Supp. 799, 801, (S.D. N.Y., 1952); *U.S. ex rel Blankenstein*, 177 F. Supp. 699 (S.D. N.Y., 1953)). The last-named section is the one here considered, and has been quoted in full; the regulations are in substantially the language of the statute. Subsection (2) provides that wilfull refusal or failure to depart after an immigration order is final shall be a felony; Section 1253 relates to the countries to which the Attorney General shall deport the aliens.

It is apparent from this summary of the deportation procedure that after the entry of a final order of deportation, the sole remaining power and duty of the Attorney General is to make sure that the alien departs from the country. It follows that the powers of supervision given him are intended as an aid in enforcing this power by making certain that the alien will be available for deportation when and if the time comes that this is possible. Clauses (1), (2), and (4) of the same subsection are reasonably calculated to fulfill this purpose. Clause (1), requiring the alien to submit himself for identification, is clearly helpful to that end; the requirement of physical examinations might be necessary to deportation to a particular country; and in (4), "to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case," the word "reasonable" may be read as "those restrictions which tend to guarantee his

availability for deportation." The same may be said of clause (3), of immediate concern here: "to give information * * * as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper." This must be read to mean such information as is necessary to enable the Attorney General to be certain that the alien is holding himself in readiness to answer the call to be deported when it comes.

The Government urges that the Attorney General may, under this section, question the alien to determine not only his availability for deportation, but also to satisfy himself that the activities for which the alien was ordered deported are not continuing. There is no warrant for such an interpretation, since the Attorney General is powerless to take any further action even if they are continuing. A deportation order is not a magic incantation, but a finding that the alien is, for one reason or another, an undesirable resident of this country. Further, it is an order entered in a civil proceeding, in which proof is by "clear and convincing" evidence, rather than beyond a reasonable doubt. *U. S. ex rel Vajtauer v. Com'r,* 273 U.S. 103, in which counsel need not be appointed (*U. S. v. Vander Jagt,* 133 F. Supp. 676 (W.D. Mich., 1955)), and hearsay evidence may be admitted (*Navarette-Navarette v. Landon,* 223 F. 2d 234 (C.A. 9, 1955)).

There is accordingly no justification for allowing a deportation order to accomplish more than its intended purpose. It establishes, in a hearing adequate for this end, that the alien shall depart this country and nothing more. The Attorney General has been given power to

supervise the alien to make sure he is available for deportation, and no further power. If, after the entry of the order, the alien engages in activity punishable under the Criminal Code, the Attorney General is at liberty to bring him before a Grand Jury and move for an indictment in the usual way. If he is not engaging in such activity, and if it is physically impossible to deport him, and if increasing numbers of aliens in this situation has created a serious problem, then Congress may solve it by giving some official definite and measureable power to deal with the dilemma. So far it has not done so, except to the extent that it has given the Attorney General the powers of supervision here considered.

This discussion has dealt with most of the objections urged by the defendant. He also urges that the statute creates a crime by legislative fiat, leaving the court nothing to do but to pronounce sentence in a summary proceeding (*Wong Wing v. United States*, 163 U. S. 228, 236 (1896)), and that procedural due process has been violated. That is not the case when the statute is correctly interpreted. The court will determine the relevancy of the questions by a definite standard: do they assist the Attorney General in making certain that the alien will be available for deportation?

Defendant also contends that the statute here considered violates the First Amendment guarantee of freedom of speech of which freedom of silence has been assumed to be a part (*United States v. O'Connor*, 135 F. Supp. 590 (D.C., 1951), and cases cited page 596). However, speech may be compelled by Congress, and silence punished, when special circumstances warrant restrictions on traditional freedoms. Thus Title 2

U.S.C. Sec. 192 making it an offense punishable by fine or imprisonment to fail to answer proper questions asked by Congressional committees has been upheld (*In re Chapman*, 166 U.S. 661, 672 (1896); *United States* v. *Bryan*, 339 U.S. 323, 327 (1949)). Under this statute, however, questions must be relevant to the Congressional power to legislate (*Quinn v. United States*, 349 U.S. 155, 162 (1955)); just as in the instant case they must relate to the valid power of the Attorney General.

The motion to dismiss the indictment is overruled. February 15, 1956.

After the announcement of the foregoing opinion, new motions and briefs were filed by both parties.

Defendant filed a "Supplemental Motion to Dismiss Indictment." His argument in support of this motion in part reiterates objections previously considered by the court. He contends that the indictment is vague and uncertain in that it fails to set forth the order of deportation, the authority by which, or the sections under which it was made, or that the defendant had notice of it. These objections must be overruled. The indictment is in the language of the statute and sufficiently notifies the defendant of the charge which he must meet. Several other objections urged were dealt with in the original memorandum, but have been reconsidered, and are overruled. The Court adheres to its original opinion that the statute, as construed, is not unconstitutional.

The government's brief in answer to this Supplemental Motion to Dismiss is devoted to the presentation of additional material in support of its original conten-

tion that the statute gives the Attorney General power to question a deportable alien about matters other than his availability for deportation. This additional information has been carefully considered and found not to be convincing. The theme of the government's argument appears to be that to let deportable aliens roam the country unsupervised would create a very dangerous situation. The Court is of the same opinion. As the previous memorandum indicated, Congress quite correctly gave the Attorney General power to make certain of the alien's whereabouts at all times. To this end, under the statute here considered, the Attorney General could properly ask, and enforce his right to receive answers to, questions as to the alien's place of residence, whether he owns his home or rents, where he works and how long he has worked there, whether he is married and lives with his wife, and an endless list of inquiries along the same line. This power is quite sufficient to ensure that the alien will not be without supervision. To hold that the statute intended to give an official the unlimited right to subject a man to criminal penalties for failure to answer absolutely any question the official may decide to ask would raise very serious constitutional questions. The Court accordingly reiterates that the power given to the Attorney General by the statute in question is to enforce his right to question a deportable alien to make certain that the latter is holding himself available for deportation.

The defendant's motion asks that the Court now examine the questions set forth in the indictment, and dismiss the indictment for the reason that it is apparent that none of them is related to his availability for deportation. Although there is no authority under this particular section, such a procedure is dictated by anal-

ogous situations in other fields. Thus it is the duty of the judge to rule on whether or not the privilege against self-incrimination has been properly claimed, and "To sustain the privilege, it need only be evident from the implications of the question, the setting in which it is asked, that responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result" (*Hoffman* v. *United States*, 341 U. S. 479, 489 (1950); quoted, *Emspak* v. *United States*, 349 U. S. 190, 199 (1954)). And in a prosecution for perjury, it is clear that the materiality of the questions asked is a question of law for the court (*Sinclair* v. *United States*, 279 U. S. 263, 298 (1929); *United States* v. *Orman*, 207 F. 2d 148, 155 (1953)), and that materiality "should appear from the face of the indictment" (*Markham* v. *United States*, 160 U. S. 319, 325 (1895)). Where the questions are not relevant on their face, but there is any probability that they could be shown to be relevant, it is proper to give the government an opportunity to make some sort of showing on the question (*Bowers* v. *United States*, 202 F. 2d 447, 449 (C.A., D.C., 1953); *United States* v. *Orman*, *supra*). However, where it appears from the indictment that the questions alleged are not even probably material, the indictment should be dismissed. (*United States* v. *Garvett*, 35 F. Supp. 644, 646 (E.D. Mich, 1940); *United States* v. *Seymour*, 50 F. 2d 930, 940 (D. Neb., 1931); *United States* v. *Cameron*, 282 Fed. 684, 692 (D. Ariz., 1922)). Where it is perfectly apparent to the trial judge from the face of the indictment that the questions set forth are irrelevant, the defendant will not be exposed to what would be a "mere ceremony of trial" (*United States* v. *Laut*, 17 F.R.D. 31, 36 (S.D., N.Y., 1955)).

In the present case, the government apparently agrees that a ruling on the questions now is the proper procedure in this case. In its brief in opposition to the motion to dismiss, it has not urged that the questions were relevant, but has confined itself to urging the court to reverse its previous position. Further, in a "Motion for Clarification" of the Court's previous memorandum, it has prayed "that the Court rule on the legality of the questions asked."

The law in analogous situations, reason, and the explicit request of both the government and defendant, thus dictate that I examine the questions set forth in the indictment. This examination is for the purpose of determining whether they are (a) clearly relevant, (b) possibly relevant, or (c) clearly irrelevant, to the matter of assisting the Attorney General to make certain that the alien is available for deportation.

Of the twenty-two questions on which the indictment is based, many are so far afield as to require no discussion, since it is apparent at a glance that they are in no way relevant to this purpose. These are as follows:

> "Can you read in any other language than Slovene and English?"
>
> "Have you attended any meeting of any organization other than the singing club?"
>
> "Have you addressed any lodges of the Slovene National Benefit Society seeking aid for you, in your behalf, in your deportation case * * *?"
>
> "Have you distributed petitions or leaflets published by the (above) Society seeking aid for you, in your behalf * * *?"
>
> "Since the order of supervision have you attended

any meetings or lectures at the Peoples Auditorium * * *?"

"* * * Have you attended any meetings or socials at the Chopin Cultural Center * * *?"

"Have you attended any movies * * * at the Cinema Annex?"

"Are you now or have you ever been a member of the Slovene American National Council?"

"Are you now or have you ever been a member of the United Committee of the South Slavic Americans?"

There is no allegation which would shed any light on how these activities would in any way affect the probability of the alien's presenting himself to immigration officials when required to do so. The questions by themselves are completely meaningless in this context.

The same may be said of ten other questions, eight of which are "Do you know John Doe?", and two "Have you visited the office of John Doe?" "We seriously doubt whether the 'Do-you-know-a-certain-person' question, without more, can ever be said to be pertinent for the purpose of a criminal prosecution under Sec. 192" (*Bowers* v. *United States, supra,* at page 447; see also *United States* v. *Auippa,* 102 F. Supp. 609, 613 (N.D., Ohio, 1950).

The first question in the indictment is "Do you subscribe to the Daily Worker?" Quite aside from its obvious irrelevancy to availability for deportation, to subject a man to criminal penalties for failure to answer a question as to what he reads would be an apparent infringement of rights protected by the First Amendment.

The remaining two questions are "Have you attended

any meetings of the Communist Party of the U.S.A.?", and "Are you now a member of the Communist Party of the U.S.A.?" It is apparent that an affirmative answer to this question would not indicate anything about whether or not the defendant was holding himself in readiness for deportation. Directly in point are the many cases which have held that whether or not a person is a member of the Communist Party, by itself, has no relationship to his fitness to be admitted to bail. The leading case is *Stack* v. *Boyle,* 342 U. S. 1, 5 (1951), in which the Court considered a motion for reduction of bail by persons indicted under the Smith Act. The only evidence offered by the Government was a showing that four persons previously convicted under that Act had forfeited bail. The Court found such a showing insufficient, remarking that "the fixing of bail for any individual defendant must be based upon *standards relevant* to the purpose of *assuring the presence of that defendant.*" (underscoring added).

A similar holding in *Christoffel* v. *United States,* 190 F. 2d 560, 567 (C.A., D.C., 1952) is explained in the following quotation:

> "The Government urges that the fact that Christoffel is a Communist and is active in party affairs renders unlikely his appearance when required to appear. * * * Moreover, even if it be assumed that (he) is a Communist and is actively engaged in Communist party affairs, this, without more, is not a proper ground for denial of bail. * * * In the instant case the present primary issue is whether Christoffel will, under the conditions of bail * * * make appearance before the court when required to do so."

The opinion then quotes from another bail case which reached the same result on the same reasoning, *Williamson* v. *United States*, 184 F. 2d 280, 284 (C.A. 2, 1950):

> "But the right of every American to equal treatment before the law is wrapped up in the same constitutional bundle with those of these Communists. If in anger or disgust with these defendants we throw out the bundle, we also cast aside protection for the liberties of more worthy critics who may be in opposition to the government of some future day."

Another authority to the same effect is *United States* ex rel *Pirinsky* v. *Shaughnessy*, 184 F. 2d 280, 284 (C.A. 2, 1950).

Accordingly, while the defendant's contention that the Act is unconstitutional is overruled, the indictment will be dismissed for the reason that none of the questions there set forth is relevant to defendant's availability to deportation.

(Sgd.) PHILIP L. SULLIVAN,
Judge.

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

Chicago, Illinois

District File No. E-10-685
A. R. No. A-5-509-411

Date March 4, 1954

ORDER OF SUPERVISION

In the case of GEORGE WITKOVICH, whose deportation in accordance with law was ordered on June 25, 1953.

Section 242(d) of the Immigration and Nationality Act provides:

> "Any alien, against whom a final order of deportation as defined in subsection (c) heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) tc submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the

Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall upon conviction be guilty of a felony, and shall be fined not more than $1,000 or shall be imprisoned not more than 1 year, or both."

Therefore, it is hereby ordered that such alien shall be placed under supervision and permitted to be and to remain at large upon the following terms:

(1) That said alien shall produce himself, at time and place designated, for deportation pursuant to the order of deportation.

(2) That said alien shall upon request produce himself at a time and place designated for the purpose of submitting to medical and psychiatric examination and/or to furnish such information as may be deemed fit and proper.

(3-a) That said alien shall notify the Officer in Charge of the Immigration and Naturalization Service at the address shown in (4) hereof of any change in residence or employment, within the immigration district, within 48 hours after change is made.

(3-b) That said alien shall apply to the Officer in Charge of the Immigration and Naturalization Service at the address shown in (4) for permission to change place of residence from one immigration

district to another, at least 48 hours prior to such change.

(4) That said alien shall report in (PERSON) the 7th day of each month at —, (a.m.) (p.m.) to the Officer in Charge of the Immigration and Naturalization Service at Room 905 New Post Office Bldg., Chicago, Illinois.

The written report shall contain (a) the name, (b) alien registration number, (c) date, (d) current address, (e) place of employment, (f)

(5) That said alien shall report to.....
in person .....

(6) That said alien shall terminate and remain disassociated from membership in, if any, support or other activity if any, in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any state, or of any foreign state or of any political or geographical subdivision of any state, any section, subsidiary, branch, affiliate or subdivision of any such group or organization.

(7) That said alien shall refrain from associating with any person, knowing or having reasonable ground to believe that such person is a member of or affiliated with or is engaged in any promotion of any of the activities mentioned in subparagraph above, provided that the term "associating" as used in this subparagraph shall not be construed to include members of such alien's family or professional legal counsel if such associations are not used in furtherance of the doctrines, policies, or

activities of any of the organizations or activities mentioned in preceding subparagraph.

(8) That said alien shall not violate Section 2385 of the "Smith" Act of June 25, 1948 (Section 2385 of Title 18, U. S. Code) and Section 4 of the Internal Security Act of September 23, 1950 (Section 783 of Title 50, U. S. Code).

(9) That said alien shall not travel outside the State of Illinois nor 50 miles outside the City Limits of Chicago, Illinois.

CHICAGO, ILLINOIS

JOHN P. SWANSON,
Chief Border Patrol &
Deportation Branch,
Chicago District.

I, George Witkovich, hereby acknowledge that I have read and understand the terms of this order, a copy of which I have received. I further understand that failure to comply with the terms of this order or with any of the conditions of 242(d) of the Immigration and Nationality Act, will subject me to prosecution.

Z. J. REAM
Parole Officer
Rm 905 New Post Office Bldg., Chgo., Ill.

——— ———,
2153 South Lawndale, Chicago, Illinois.

I, ..., hereby acknowledge that I understand the terms set forth above and hereby agree to furnish a written report ..... each month to the Officer in Charge concerning the alien's

name, registration number, current address, place of employment, associates, and organizational activities, and that I will immediately report any failure on the part of the alien to comply with the terms of the order or information coming to my attention which might indicate that the alien intends to abscond or otherwise violate this order.

Note: The subject refused to sign acknowledgment of this order therefore, it was read to him in the presence of the undersigned, this 4th day of March, 1954.

(S.) D. J. SHIPMA,
Investigator.
(S.) R. A. DENNER,
Patrol Insp.

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